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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN PATRICK KENNEY, Plaintiff and Appellant, v. CAROL LOUISE PANGBURN et al., Defendants and Respondents.	G042647 (Super. Ct. No. 30-2009-00123277) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Charles Margines, Judge. Affirmed.

John Patrick Kenney, in pro. per., for Plaintiff and Appellant.

Good, Wildman, Hegness & Walley, John A. Stillman and Heidi Stilb Lewis for Defendants and Respondents Carol Louise Pangburn, Good, Wildman, Hegness & Walley, John A. Stillman and Heidi Stilb Lewis.

Sedgwick, Detert, Moran & Arnold, Gregory H. Halliday and Charles N. Hargraves for Defendants and Respondents Good, Wildman, Hegness & Walley, John A. Stillman and Heidi Stilb Lewis.

Plaintiff John Patrick Kenney appeals from the grant of a special motion to strike (Code Civ. Pro., § 425.16; anti-SLAPP motion; all further statutory references are to this code unless otherwise stated) the complaint filed by defendants Carol Louise Pangburn, Good, Wildman, Hegness & Walley, John A. Stillman, and Heidi Stilb Lewis. He argues the lis pendens filed by defendants was not protected speech and that he has shown the likelihood of prevailing on his complaint. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

Pangburn owns a condominium unit, which includes an undivided interest in the common area. Common area, as defined in the condominium's covenants, conditions, and restrictions (CC&R's), includes airspace. In 2008, after learning plaintiff had obtained a permit to add two additional stories on his unit in the condominium project, Pangburn, represented by the other defendants, sued him (underlying action) to quiet title to her interest in the common area. Pangburn also recorded a lis pendens.

Plaintiff then filed an ex parte motion to expunge the lis pendens, seeking costs and attorney fees. A copy of the motion is not in the record but we do have a transcript of the argument on the ex parte hearing motion. Plaintiff, who wanted to "build[] straight up," argued the lis pendens was improper because Pangburn did not have a interest in the common area, claiming he had reserved the right to develop the property above the roof.

The judge stated at the hearing that it would not grant the motion ex parte because Pangburn had not had an opportunity to respond, and he questioned plaintiff's right to develop the property in the manner he had proposed. His review of "the definition of 'common area' in the CC&R[']s . . . seem[ed] . . . to include the area directly above [plaintiff's] unit. I know [plaintiff] argues otherwise, but, if so, [Pangburn] does have some say so in this." During the hearing counsel for both parties

and the judge reached a settlement of the matter, as follows: "[B]ased on the discussions with counsel, the court orders the lis pendens expunged forthwith. No fees and costs are awarded. The expungement is conditioned upon [plaintiff's] undertaking, absolutely no construction on the property that's at issue here. And the order . . . forbidding construction will remain in effect until the resolution of the matter at JAMS, and perhaps thereafter, depending on what the ruling is at JAMS . . . ." A written order to the same effect was entered. As a result Pangburn recorded a withdrawal of the lis pendens. Upon the parties' agreement, the underlying action was then ordered to binding arbitration.

A few months later plaintiff filed the current action for malicious prosecution, slander of title, intentional infliction of emotional distress, and interference with prospective business advantage. The essence of each cause of action is that the underlying action was not based on a real property claim and thus there was no legal basis for filing the lis pendens, which defendants knew. In the malicious prosecution count plaintiff pleaded that the expungement of the lis pendens was a sufficient favorable termination to support the claim.

The court granted defendants' anti-SLAPP motion, ruling that they had met the burden to show the lis pendens was protected speech under section 425.16 subdivision (e)(1), (2), and (4) and its recording was not illegal. It also found the expungement of the lis pendens was not a favorable termination to support a malicious prosecution claim and as to the other causes of action recording the lis pendens was privileged under Civil Code section 47, subdivision (b).

DISCUSSION

1. Introduction

Section 425.16, subdivision (b)(1) provides a party may bring a special motion to strike any "cause of action against [that party] arising from any act [the party

commits] in furtherance of the . . . right of petition or free speech under the United States or California Constitution in connection with a public issue . . . ." An "'act in furtherance of a person's right of . . . free speech under the United States Constitution or the California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; . . . (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(1), (2), (4).)

The court must engage in a two-step analysis of an anti-SLAPP motion. First it has to determine whether the defendants have met their burden to show "that the challenged cause of action is one arising from protected activity." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.) If so, the burden shifts to the plaintiff to show the likelihood of prevailing on the claim. (*Ibid*.) "'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citations.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1036.) The intent of the statute is to prevent "chill[ing] the valid exercise of . . . freedom of speech and petition . . . through abuse of the judicial process" and to that "end, th[e] section [is to] be construed broadly." (§ 425.16, subd. (a).) We review an order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

2. Protected Speech

The law is settled that filing a lis pendens comes within the definition of protected speech under section 425.16. (E.g., *Park 100 Inv. Group II v. Ryan* (2009) 180 Cal.App.4th 795, 806.) We reject plaintiff's argument that defendants have not met their burden because their conduct was illegal as a matter of law. *Flatley v. Mauro, supra,* 39 Cal.4th 299, on which he relies, is inapt. In that case, after the plaintiff sued the defendant for extortion, the court upheld denial of the defendant's anti-SLAPP motion stating that where "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." (*Id*. at p. 320.)

Here defendants have not conceded filing the lis pendens was illegal. And "[e]ven if a lis pendens is not appropriate under the circumstances, it is not an illegal act forbidden by law. [Citation.]" (*Park 100 Inv. Group II v. Ryan*, *supra*, 180 Cal.App.4th at p. 806.) Nor was it an unconstitutional taking of plaintiff's property in violation of the Fifth and Fourteenth Amendments. "The notice of lis pendens does not deprive [plaintiff] of . . . any significant property interest. He may still use the property and enjoy the profits from it. [Citation.]" (*Empfield v. Superior Court* (1973) 33 Cal.App.3d 105, 108.)

3. Probability of Prevailing

a. Nature of Easement

A major premise underlying plaintiff's entire argument is that he has an easement in gross, which is not a possessory interest in real property subject to a lis pendens. This argument is flawed. Pangburn's interest in the common area was a real property interest for which a lis pendens could be filed.

Section 405.20 allows "[a] party to an action who asserts a real property claim [to] record a notice of pendency of action in which that real property claim is alleged." Section 405.4 defines "'[r]eal property claim'" as "the cause or causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility."

Plaintiff erroneously asserts that "[t]o satisfy [section] 405.20 easements need be appurtenant. Easements[]in[]gross, by definition[,] are not appurtenant." He relies, without much discussion, on the legislative history of the amendments to sections 405.4 and 405.20 to support his contention. "These amendments comprehensively revised the lis pendens statutes. [Citations.]" (*Park 100 Inv. Group II v. Ryan*, *supra*, 180 Cal.App.4th at p. 811.) The legislative history shows just the opposite of plaintiff's position. "Documents in the legislative history make no distinction between . . . lis pendens placed on a dominant or a servient tenement. . . . [¶] The reports . . . discuss *all* easements." (*Ibid.*; italics added.) Therefore, whatever type of easement Pangburn owns may be protected by a lis pendens. And any easement plaintiff may or may not have is irrelevant. A lis pendens protects the property interest of the party filing it. (§ 405.20.)

We also reject plaintiff's claim that, at the hearing, the court had to make findings under sections 405.31 and 405.32, which require expungement of a lis pendens if the action on which it is based lacks a real property claim or the person filing the lis pendens cannot show the validity of the claim. The matter was settled at the ex parte hearing. That resolved the controversy, eliminating any need for rulings. Moreover, there is no factual support in the record for plaintiff's claim defendants failed to identify the specific property in the underlying action. (*Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com*. (2006) 135 Cal.App.4th 793, 814 [we need not address factually unsupported argument].)

b. Malicious Prosecution

The elements of a cause of action for malicious prosecution are "'that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) Recording a lis pendens can be the basis of a malicious prosecution action and does not require that the associated action be favorably terminated. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 379, 382; *Freidberg v. Cox* (1987) 197 Cal.App.3d 381, 387.)

In this case plaintiff cannot show a favorable termination and thus cannot meet his burden to show a probability of prevailing. Contrary to plaintiff's unsupported conclusion, the record clearly reflects the lis pendens was expunged by settlement. A settlement is not a favorable termination for purposes of a malicious prosecution claim. (*Hurvitz v. St. Paul Fire & Marine Ins. Co.* (2003) 109 Cal.App.4th 918, 928.)

Plaintiff relies on *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735 to support his claim that the mere existence of a settlement does not defeat his malicious prosecution cause of action. In *Siebel* the plaintiff won the underlying action, after which appeals were filed. Before resolution the parties settled certain issues that were not relevant to the judgment in the plaintiff's favor. The plaintiff subsequently brought the action at issue and the defendants obtained summary judgment based on lack of a favorable termination. The Supreme Court affirmed reversal by the appellate court, holding that "[b]ecause [the plaintiff] received a favorable judgment in the underlying proceeding and settled without giving up any portion of the judgment in his favor, . . . the parties' settlement constitute[d] a favorable termination. [Citations.]" (*Id.* at p. 743.) The court specifically limited its holding to "a postjudgment settlement by the parties that does not fundamentally change the parties' relationship established by the underlying judgment on

the merits." (*Id*. at p. 744.) The facts in our case are completely different and *Siebel* is inapt.

Plaintiff's assertions his counsel was not authorized to enter into the settlement and the court "coerced" a settlement are not supported by the record. The only evidence that may be relevant to his claim as to counsel is plaintiff's declaration in opposition to the anti-SLAPP motion that he discharged his lawyer "for malpractice and extreme incompetence." Even if this were sufficient evidence, it is not an issue we may determine in this appeal. Moreover there is nothing in the record showing the court coerced the settlement, was biased, or otherwise engaged in misconduct, and we caution against such unfounded accusations.

Likewise, plaintiff's argument based on section 674 of the Restatement Second of Torts is not well taken. That provision, which sets out the elements for an action for malicious prosecution, excepts from the favorable termination requirement ex parte proceedings. The comments make clear, however, that this minor exception applies only when the moving party has obtained relief without the opposing party having the opportunity to be heard. (Rest.2d, Torts, § 674, com. k, p. 457.) That was not the case here, where the lis pendens was expunged pursuant to a settlement. Because plaintiff has not demonstrated the probability of success on this element there is no need for us to discuss the remaining elements of the cause of action.

c. Slander of Title, Intentional Infliction of Emotional Distress, and Interference with Prospective Economic Advantage

Plaintiff cannot show the likelihood of prevailing on the remaining three counts because they are privileged under Civil Code section 47, subdivision (b), which states: "A privileged publication or broadcast is one made [¶] . . . [i]n any . . . judicial proceeding . . . or . . . in the initiation or course of any other proceeding authorized by

law . . . ." "'The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]' [Citation.]" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057.) The litigation privilege applies to all intentional torts except malicious prosecution (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 913), and thus covers the three tort claims at issue here. Because the filing of the lis pendens was absolutely privileged under Civil Code section 47, subdivision (b), plaintiff has not made out a prima facie case for these causes of action. (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1488.)

We reject plaintiff's reliance on Civil Code section 47, subdivision (b)(4), which provides: "A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law." The underlying action for quiet title affected Pangburn's title to and right of possession of her easement. (*Park 100 Inv. Group II v. Ryan*, *supra*, 180 Cal.App.4th at p. 810-811 [lis pendens to prevent encroachment of easement on servient tenement is privileged].)

Plaintiff's argument that Civil Code section 47, subdivision (b) does not apply to "a republication of the pleadings" is not well taken. The republication discussed in *Silberg v. Anderson* (1990) 50 Cal.3d 205, on which plaintiff relies, dealt with defamation in that statute. The court stated that republication of the alleged defamatory statement was not a communication made in a judicial proceeding as Civil Code section 47 requires. Rather, "[t]he recordation of a lis pendens is a republication of the pleadings in the underlying action and so is subject to the absolute privilege in Civil Code section 47. [Citation.]" (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1378.)

Thus the recording of the lis pendens does not support causes of action for slander of title or interference with prospective economic advantage (*Park 100 Inv.*

Group II v. Ryan, supra, 180 Cal.App.4th at p. 813) or intentional infliction of emotional distress (*Lerette v. Dean Witter Organization, Inc.* (1976) 60 Cal.App.3d 573, 579).

To the extent plaintiff raises other arguments that are either unclear or unsupported by appropriate authority, reasoned legal argument, or both, they are waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

DISPOSITION

The order is affirmed. Respondents are entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.